United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

74-2343

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GER-RO-MAR, INC., a Corporation
d/b/a SYMBRA'ETTE, and
CARL G. SIMONSEN, individually and
as President of
GER-RO-MAR, INC., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the
Federal Trade Commission

BRIEF FOR RESPONDENT

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STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Commission's findings that petitioner's violated Section 5 of the Federal Trade Commission Act by engaging in certain deceptive acts and practices and numerous anticompetitive activities in connection with the promotion and operation of their Symbra'Ette marketing program.

2. Whether the Commission's order is reasonably related to the unlawful violations found.[1/]

1/ An Amicus Curiae brief has been filed by Direct Selling Association. The contentions therein are answered herein at pp. 66-68.

STATEMENT OF THE CASE

This case arises upon a petition to review an order to cease and desist issued by the Federal Trade Commission at the conclusion of an administrative proceeding upon a complaint alleging that petitoners, i.e., Ger-Ro-Mar, Inc., d/b/a Symbra'Ette, and Carl G. Simonsen, individually and as president of Ger-Ro-Mar, Inc. ("Petitioners"), engaged in unfair and deceptive acts and practices and unfair methods of competition in connection with the promotion and operation of their Symbra'Ette marketing program in violation of Section 5 of the Federal Trade Commission Act.[2/]

Proceedings before the Commission

A. The Complaint, answer and hearing

The Commission's complaint which issued on November 24, 1971, alleged that petitioners are engaged in the advertising, offering for sale, sale, and distribution of brassieres, girdles, swim-wear, wigs and lingerie to the public under the Symbra'Ette

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2/ Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, as amended by 88 Stat. 2183, 2193, P.L. 93-637, §201 (1975), provides in pertinent part:

Section 5(a)(1): "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

Section 5(a)(6): "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

marketing system (Comp. 2).[3] Petitioners have caused their products to be shipped to various states in the United States (Comp. 2).

Ger-Ro-Mar, the complaint alleges, has formulated a distribution system involving distributors at wholesale and retail levels and "has published its marketing plan or distribution policies which are set forth in Symbra'Ette's price lists, discount schedules, marketing manuals, sales bulletins, order forms, pamphlets, and other materials and literature" (Comp. 2).

The complaint characterizes the Symbra'Ette marketing plan as a "distribution network which allows a potential distributor to enter at one of three levels," Key Distributor, Senior Key or Supervisor "and eventually qualify at a fourth and fifth level, that of District Manager and Regional Manager" (Comp. 3).[4]

It is averred that all distributors, except Key Distributors, buy from Symbra'Ette and that a distributor's gross

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3 / Abbreviations used are as follows: "Comp." - Complaint; "Ans." - Answer; "Tr." - Transcript; "CX" - Commission's exhibits; "RX" - Petitioners' exhibits; "I.D." - Administrative Law Judge's initial decision; "Op." - Commission's decision; "Final Or." - Commission's final order; "Pet. Br." - Petitioner's brief in this Court; "Am. Br." - Amicus Curiae Brief of Direct Selling Association. With respect to the papers filed in the administrative proceeding, the page numbers are those of the documents as originally filed.

4 / On April 1, 1972, the Symbra'Ette marketing plan was revised to comprehend only four levels of distribution with entry permitted only at the lowest or "Consultant" level (CX 92(3)-(4)).

The instant proceeding involves the Symbra'Ette marketing plan in effect on the November 24, 1971 issue date of the Commission's complaint.

profit is the difference between the price or prices he pays for Symbra'Ette products and the price at which he sells them "plus overrides on sales made by those people he has recruited to sell, and overrides on sales made by recruits' recruits ad infinitum" (Comp. 3).

The complaint further states that pursuant to certain agreements, Ger-Ro-Mar has "required all distributors to adhere to the Symbra'ette marketing plan." All distributors have agreed to abide by all rules and regulations established by Symbra'Ette in furtherance of the marketing plan (Comp. 5).

It is further claimed that Ger-Ro-Mar entered into contracts with its distributors pursuant to which they "agree to maintain the resale prices established and set forth by the company" (Comp. 5).

The complaint also alleges that Ger-Ro-Mar entered into contracts with its distributors under which the distributors are restricted as to their suppliers, customers and retail outlets (Comp. 5).

The complaint further alleges that Ger-Ro-Mar's merchandising program "is in the nature of a lottery" because it contained the elements of prize, chance, and consideration (Comp. 6).

It is additionally stated in the complaint that while Ger-Ro-Mar's merchandising program promises large sums of money through "a virtually endless chain of recruiting additional participants" and from "commissions, overrides or other compensation" on sales and further recruiting activities of their own distributors, the program "must ultimately collapse

when the number of potentially available distributors" is exhausted. Consequently, while early entrants may realize profits through recruiting, participants entering later "will find recruiting more difficult and ultimately impossible" (Comp. 7). The program, the complaint continues, is based upon "the exploitation of others" who have no chance to receive the kind of return on their investment implicit in said merchandizing program (Comp. 8).

The complaint avers that petitioners have represented that it is not difficult "to ascend to a higher level" within the marketing program, that all participants have "the potentiality and reasonable expectancy of receiving large profits," and that the program "is commercially feasible for all entrants," the supply of available entrants being "virtually inexhaustible" (Comp. 8). In truth and in fact, the complaint avers, ascent by participants is difficult, not all participants have the potentiality or reasonable expectancy of receiving large profits, petitioners' marketing program is not commercially feasible for all participants, and the supply of available entrants and investors will ultimately be exhausted (Comp. 9).

It is therefore alleged in the complaint (1) that the use by petitioners of their multi-level merchandising program in connection with the sale of their merchandise "was and is an unfair method of competition in commerce" and "an unfair and deceptive act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act" (Comp. 8), (2) that petitoners' specific statements and representations "are false, misleading and deceptive" and "constitute

unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act" (Comp. 9), (3) that petitioners' pricing practices "constitute an unreasonable restraint of trade and an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act" (Comp. 10), and (4) that petitioners' customer, supply and retail outlet restrictions "constitute an unreasonable restraint of trade and an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act" (Comp. 10).

In its answer petitioners denied some allegations of the complaint, admitted others, and asserted certain affirmative defenses. The answer generally denies the substantive allegations of the complaint except that it is admitted (Ans. 1) that petitoners' goods are sold under the name "Symbra'Ette," the averments of paragraph 1 of the complaint (Comp. 2). It is further admitted (Ans. 2) as the complaint states (Comp. 2) that Ger-Ro-Mar "has formulated a distribution system and has published its marketing plan or distribution policies," the averments of paragraph 5 of the complaint. Admitted also (Ans. 4) is the averment that "Ger-Ro-Mar represents in its promotional material that each distributor can recruit five dealers per month (Comp. 7), the averments of paragraph 11 of the complaint. It is asserted however, that Ger-Ro-Mar "has a turnover of its distributors and dealers in the manner other sales organizations have turnovers in their distributors and dealers" (Ans. 3) in

response to the allegation that saturation of prospective participants must ultimately occur under mathematical laws of geometric progression (Comp. 6).

Extensive hearings were held and evidence as to the allegations of the complaint, and the complexities of petitioners' multi-level marketing program was received into the record.

B. The Administrative Law Judge's initial decision

After the hearing, the Administrative Law Judge issued his initial decision. The Symbra'Ette marketing program, stated the Law Judge, was "unfair and deceptive" (I.D. 27). The large earnings promised by petitioners' marketing plan "required the development by every prospect of his own 'organization' or 'personal group' made up of his recruits, and their recruits, etc." (I.D. 25). The Law Judge reasoned that the number of Symbra'Ette distributors "must increase geometrically for the plan to provide each and every prospect with an 'organization' or 'personal group' yielding the returns represented" and that "sustaining such a growth rate for any significant period is utterly impossible because of a lack of potential distributors" in that "most or all of them would have been recruited" (I.D. 26). Hence the program, said the Law Judge, was "inherently misleading and deceptive" (I.D. 26) and had the capacity to cause potential distributors to invest large sums of money as well as their "labor, time, and energy" (I.D. 27).

The Law Judge further found that Symbra'Ette marketing plan constituted a lottery (I.D. 33), after finding the required elements of consideration, chance, and prize (I.D. 27-33).

It was further found by the Law Judge that petitioners had made certain specific misrepresentations: that it was not difficult for participants in the Symbra'Ette program to ascend to higher levels of distribution increasing their earnings in accordance with petitioners' representations; that every participant had the reasonable expectancy of large profits or earnings; and, that the Symbra'Ette program was commercially feasible for all recruits (I.D. 41). "The record herein establishes that these representations were made," said the Law Judge, "and that all were false, misleading and deceptive" (I.D. 41).

The Law Judge also concluded that petitioners "fixed the prices at which [their] distributors could resell Symbra'ette products" and thereby violated Section 5 of the Federal Trade Commission Act (I.D. 42). More particularly, the Law Judge found that through contracts, agreements, and understandings entered into with petitioners, all Symbra'Ette distributors "agree to maintain the resale prices established" by the petitioners and further "agree on the fees, bonuses, discounts, rebates and overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors"

(I.D. 22). In support of his finding, the Law Judge referenced specific provisions in the distributor agreements binding each distributor to specified marketing procedures, including adherence to specific regulations, one of which required distributors to sell at suggested retail prices set forth in company ordering forms (I.D. 23).

The Law Judge additionally found that petitioners, by contract, had prohibited each distributor from competing for the customers of any other distributor (I.D. 23), had restricted Key Distributors to purchasing only from their sponsors (I.D. 24), and had restricted retail sales and the display of Symbra'Ette products to "authorized retail channels" (I.D. 24). The Law Judge held these restraints to be "plainly unlawful" where after sale of their products to their distributors, petitoners "have parted with dominion over them" (I.D. 42).

Having found the above practices to be in violation of Section 5 of the Federal Trade Commission Act (I.D. 44), the Law Judge entered a cease-and-desist order prohibiting the practices found to be unlawful (I.D. 44-49).

C. The Commission's decision

On July 23, 1974, in an opinion by Commissioner Dixon, the Commission, based upon its own review of the record and analysis of the testimony and exhibits, upheld and adopted [5/] most of

5/ The Commission's order sets forth those portions of the Law Judge's findings and opinion adopted by the Commission (Final Or. 1).

the findings of the Law Judge, rejected the finding that petitioners' multi-level marketing program constituted a lottery, and concluded that the adopted findings and its own, together with other record evidence not in dispute, established violations by petitioners of Section 5 of the Federal Trade Commission Act (Op. 6-24).

The issues before the Commission centered primarily upon the sufficiency of the evidence to support the allegations of the complaint (1) that petitioners' open-ended, multi-level marketing program was in the nature of a lottery, (2) that petitioners use of that program was unfair and deceptive, (3) that petitioners had made specific misrepresentations about the program in the sale of their products to distributors, (4) that petitioners had engaged in vertical price fixing, and (5) that petitioners had engaged in unlawful customer restrictions. The Commission noted in its decision that subsequent to the institution of the Commission's complaint petitioners modified their system to permit, among other revisions, refunds to distributors if requested within a fixed period of time and a limitation upon the number of distributors permitted in any state. The Commission expressly based its opinion, however, upon the system existing at the time of the complaint (Op. 3).

Petitioners distributed various promotional materials, the Commission continued, to persuade individuals to become Symbra'Ette consultants. The printed matter so disseminated

described the marketing program in detail, illustrated how an individual could earn an annual income as high as $90,600, and promised that anyone could attain the top level of Regional Manager (Op. 5). The Commission observed that "the entire thrust" of petitioners' promotion "was to induce people to join by offering them both the opportunity to retail, and the chance to build an organization via recruitment" (Op. 6). Moreover, the prospective Symbra'Ette distributor "was chiefly attracted by the recruiting aspect of the program" as represented in the promotional materials (Op. 6).

In its opinion the Commission considered seriatim the substantive allegations of the administrative complaint:

Inherent Deception. "[T]he challenged program had the substantial tendency, capacity, and potential to mislead," ruled the Commission (Op. 8). Similarly, in representing their plan, petitioners "held out to individuals the possibility of making large sums of money through a combination of retail selling of merchandise and recruitment of others" who also would sell and recruit. Next, focusing upon the deception inherent in petitioners' program, the Commission found that "operation of such a plan creates the overwhelming likelihood of deception," because (Op. 8):

> . . . at some point the representation that the plan affords a reasonable business opportunity will be made to individuals to whom it will appear plausible, but for whom it will be blatantly untrue, by virtue of the fact that the universe of potential recruits . . . has been effectively exhausted.

The danger of such open-ended multi-level sales schemes with their potential to deceive, the Commission found, "lies in the seeming universal feasibility of a money-making mechanism which is in fact not universally feasible at all" (Op. 10).

The Commission dismissed petitioners' attempt to prove the absence of deception by relying upon the fact that the number of distributors at any one time never exceeded 3,635 and subsequently declined from that total. Observing hypothetically that the market for distributors may have been limited to several thousand, the Commission envisioned the possibility of discovery by later recruits that further recruitment or retail sales would prove financially unrewarding (Op. 9).

Similarly the Commission rejected petitoners' argument that instead of causing deception, the system has "reached a 'stable equilibrium'" in which "no one is deceived and everyone's expectations are vindicated" (Op. 10). The Commission noted in response that those who created the "stable equilibrium" by leaving the program without exerting the necessary effort to succeed have still been deceived by their having been led to believe that they could have succeeded with effort. The Commission further observed that a failure to injure is no defense to the institution of a potentially deceptive scheme. The appeal of petitioners' marketing program, the Commission stated, is the same as that of a chain letter and similar devices which have traditionally been recognized as "a threat to the public welfare" (Op. 10).

Accordingly, the Commission discarded petitioners' assertion that the Symbra'Ette program is distinguishable from a chain letter or pyramid scheme in that returns are based upon product sales. The Commission found instead that under petitioners marketing plan overrides and commissions are based upon the purchase volume of a participant's recruits (Op. 11).

Specific Misrepresentations. The administrative complaint, the Commission observed, contained allegations of three specific representations made by petitioners (Op. 12): (1) that it is not difficult for participants to ascend to a higher level within the marketing chain so as to increase their chances of recouping their investments and of earning the represented profits; (2) that all participants in the marketing program have the potentiality and reasonable expectancy of receiving large profits or earnings; and (3) that the marketing program is commercially feasible for all participants, and that the supply of available entrants and investors is virtually inexhaustible.

The Administrative Law Judge, the Commission determined, "properly concluded that the challenged representations were conveyed by [petitioners'] promotional literature" (Op. 13).

Accordingly, the Commission found that both petitioners' marketing plan, "and specific representations made to promote it, were deceptive" (Op. 13).

Lottery. The Commission vacated those portions of the Administrative Law Judge's decision concerning the lottery count of the complaint and further eliminated comparable portions of the Law Judge's proposed order (Op. 21).[6]

Price Fixing. "With respect to the allegations of price fixing," the Commission concluded, "the recitation in Finding 27 of the Initial Decision is sufficient to establish the violation" (Op. 21). The Commission noted that the agreement signed by petitioners' distributors required the distributor to sell Symbra'Ette products in accordance with the procedure set forth in petitioners' Sales Manual and advised the distributor that failure on his part to comply would be considered just cause for termination of his agreement (Op. 21).

After quoting that part of the Sales Manual requiring that sales of Symbra'Ette products be made at suggested retail prices (CX 74P), the Commission determined that "[t]he effect of these provisions was to create an agreement to fix prices, and such an agreement is illegal *per se*" (Op. 21).

Dismissing as immaterial a consideration of whether petitioners ever attempted to enforce the provisions, the

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6 / While readily affirming the Law Judge's findings of prize and consideration, the Commission was unable to identify the element of chance in the Symbra'Ette marketing plan (Op. 17). The Commission's failure so to find lay in its inability to distinguish "between the concededly large element of chance involved here, and that inherent in numerous legitimate business endeavors" (Op. 19).

Commission observed the danger that one of the parties to such a contract "will feel obligated to adhere to the contractual language" even if technically unenforceable (Op. 22). And here especially, the Commission continued, "that danger was considerable, since the parties to these agreements were generally not established business people with legal counsel who might be expected to realize the illegality of vertical price-fixing" (Op. 22).

The Commission also rejected the asserted defense that the language pertaining to price fixing was removed from the Sales Manual after the institution of the Commission's investigation. The Commission ruled that "such belated abandonment is no defense" (Op. 22). Accordingly, the Commission decided to retain in essence that part of the Law Judge's order concerning price fixing, "for the purpose of prohibiting any recurrence in the future of illegal practices shown to have existed in the past" (Op. 22).

Customer Restrictions. "We find no reason," the Commission stated, "to disturb Findings 28, 29 and 30 of the Initial Decision, which indicate that [petitioners] did contract with their distributors so as to limit the parties to whom the distributors could resell their products" (Op. 23). The restrictions considered by the Commission included prohibition of sale by one distributor to a retail customer of another, prohibition of sale by one distributor to a sub-distributor

of another, and prohibition of sale by one distributor to retail outlets with the exception of certain exclusive boutiques engaged in custom fitting and not handling a competitive line of products (Op. 23). The Commission dismissed petitioners' arguments that they never enforced the restrictions and that such restrictions are no longer in effect "for the same reasons noted in the discussion of price-fixing" (Op. 23).

The Commission carefully considered the corrective action necessary both to enable petitioners to engage in some measure of recruiting in furtherance of a "legitimate, non-deceptive direct selling business organization" and to remove from petitioners' business operation "the abuses of recruitment found in this case," and particularly, "the deceptive lure of profits tied to continuous recruitment" which creates the illusion that success can be achieved even if the factor of product sales to consumers is ignored (Op. 14). The Commission therefore sought to strengthen those portions of the order concerning the misrepresentation of potential earnings by adding a paragraph requiring petitioners to maintain records to substantiate any claims pertaining to earnings (Op. 14).

The Commission also included a provision in the order requiring that each distributor paying a consideration to petitioners be advised as to the number of other Symbra'Ette distributors in his marketing area (Op. 15). The order should also prohibit, the Commission determined, the representation

that the supply of potential entrants under petitioners' marketing plan is inexhaustible. In furtherance of this objective, the Commission rejected an attempt by petitioners to limit the provisions to exclude from order coverage those representations made in states where the number of active participants in petitioners' program is fewer than 1/10 of 1% of the population of the state in which the representation was made. Such a qualification, the Commission reasoned, would overlook petitioners' inability to determine how many distributors can be supported by any given market area (Op. 15).

To "help remedy any injury done to distributors who enter the program as a result of deception," the Commission included in the order a provision requiring the refund to a distributor of the purchase price of his initial inventory purchase when a request therefor is made within 30 days of the purchase (Op. 15).

In an effort to cure the inherent deception which it found in the Symbra'Ette program, the Commission in Paragraph 1 of its order, precluded petitioners from conducting a marketing program wherein a distributor's payment to petitioners is for the right to compensation for the act of recruiting without regard to that distributor's sales to consumers (Op. 16). Paragraph 1, the Commission stated, "is designed to insure that any compensation" received by a Symbra'Ette distributor for recruiting activities "will be based strictly on product sales of recruits" and not upon their inventory purchases (Op. 16).

To solve the problem presented by a plan of unlimited recruiting, the Commission modified order Paragraph 2 recommended by the Law Judge to permit "a three-tiered system of distribution" with the provision that participants at the lowest level may not recruit for one year following their entry into the program (Op. 17). Such a provision was included by the Commission to allow petitioners a "reasonable flexibility in building a distribution network," while guaranteeing that petitioners' marketing program be presented to prospective participants "in a way which makes clear that their profits will depend directly on their own efforts in retailing to consumers or in building a retail organization" (Op. 17).

In framing those paragraphs relating to petitioners' price fixing practices, the Commission considered the relief most appropriate for an enterprise structured along the lines of the Symbra'Ette organization. Recognizing that distributors in the Symbra'Ette organization "are constantly changing and frequently have little or no business experience," the Commission observed that "there may even be a positive value in permitting dissemination of suggested price information, provided it is clear that advice is given merely as a suggestion" (Op. 22). The Commission also weighed the fact that the petitioners' price fixing practices had been abandoned. Accordingly, the Commission amended the Law Judge's order to permit petitioners to mention suggested retail prices to their distributors, provided that any form or list containing

suggested prices also note that such prices are suggested and not obligatory (Op. 23).

Accordingly, the Commission issued an order to cease and desist which prohibited the practices found to be unlawful (Final Or. 1-5).

The Facts

The material facts as found by the Commission may be summarized as follows:

Petitioner Ger-Ro-Mar, Inc., a California corporation, whose corporate name is now Symbra'Ette, Inc., is engaged in the advertising, sale and distribution of brassieres, girdles, swimwear, and lingerie in various states of the United States (CX 92(1)-92(2); I.D. 4).

Petitioner Carl G. Simonsen, President and Director of Symbra'Ette, Inc., is responsible for directing the business practices of Symbra'Ette (Op. 2). Symbra'Ette is a trade name under which Mr. Simonsen conducts his business (CX 92(2); I.D. 4).

During the period 1965-1969, Symbra'Ette's sales to distributors grew from $36,832.91 to $2,054,250.62, and then declined to $1,195,465.75 in 1972 (CX 92(2); I.D. 4).

Prior to April 1, 1972,[7/] Symbra'Ette products were sold through a distribution network, called the Symbra'Ette marketing plan, which provided for entry by a potential distributor at

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7 / Petitioners' change of their marketing plan after the November 24, 1971 Commission complaint (Pet. Br. 8-11) does not remedy the deception found by the Commission to be inherent in its pyramid-type sales scheme. Even if it did, the law is well established that discontinuance is no defense to an order. Deer v. FTC, 152 F.2d 65, 66 (2d Cir. 1945); Giant Food Inc. v. FTC, 322 F.2d 977, 986-87 (D.C.Cir. 1963), cert. dismissed, 376 U.S. 967 (1964); Marlene's, Inc. v. FTC, 216 F.2d 556, 559 (7th Cir. 1954).

any one of three distributional levels called "Key Distributor," "Senior Key," or "Supervisor," and thereafter to qualify for promotion to a fourth and a fifth level respectively designated "District Manager" and "Regional Manager" (CX 92(4)-92(5); Op. 3). Entry into the Symbra'Ette organization as a distributor at one of the first three levels was accomplished by the purchase of merchandise from Symbra'Ette or one of its distributors (CX 92(5); Op. 3-5; I.D. 6-8).

All distributors in the Symbra'Ette organization bought their merchandise directly from Symbra'Ette, except for Key Distributors who purchased directly only from their sponsoring distributors (CX 74D, 75R, 92(5); Op. 3). Initial purchase requirements are stated in terms of "Retail Purchase Volume," the volume of merchandise purchased valued at its suggested retail price (Op. 3). The total purchase volume required to be purchased each month increased with each distributional level from $300 for Key Distributors to $25,000 for Regional Managers (Op. 4; I.D. 7-9). Distributors purchased at discounts ranging from 35% for Key Distributors to 55% for Regional Managers (CX 75S; I.D. 7-9). A distributor's gross profit was the difference between the price or prices he paid (at discount) for Symbra'Ette products and the price or prices at which he sold them plus, for distributors above the level of Key Distributor, additional profits on the purchase volume of those distributors whom he sponsored (CX 74D, 92(5)-92(6); Op. 5).

Recruiting was a key element in the Symbra'Ette marketing program (Tr. 55, 60, 64, 78; I.D. 25). Encouraged to engage in unlimited

recruiting, a Key Distributor could advance to the level of Senior Key if the total of his Retail Purchase Volume and that of the distributors recruited by him totaled $1,000 in any calendar month (CX 74D, 74G, 92(5); Op. 5). Similarly, the Symbra'Ette marketing plan contemplated ascent by Senior Keys, Supervisors, and District Managers to the next higher levels of distribution by achieving the requisite Retail Purchase Volume computed by adding their respective purchases to those of their respective recruits and their recruits (CX 75T; I.D. 7-9).

The promotional materials utilized by petitioners and their distributors in their recruiting efforts contained certain specific representations. Potential recruits were told that ascent to a higher level within the marketing chain could be achieved without difficulty and would thereby increase the chances of the participant to recover his investment and to earn the represented profits (CX 1E, 74D, 74F, 75R; I.D. 20). The prospective Symbra'Ette distributor was also advised of the potentiality and reasonable expectancy of all participants to receive large profits or earnings ((CX 1E, 2A, 74B, 74J, 75V, 75Y, 75Z, 75Z2-75Z6, 75Z8-75Z10; I.D. 18). It was further represented that the marketing program was commercially feasible for all distributors and that the supply of available entrants and investors was virtually inexhaustible (CX 1D-1E, 2B, 74F, 74L, 75R, 75Z11; I.D. 20).

In carrying forward the marketing plan, Symbra'Ette and its distributors entered into agreements which bound each distributor to abide by the rules and policies of the Symbra'Ette organization (CX 11-22; I.D. 22-23). Failure to cooperate would subject the offending distributor to termination of his contract (CX 11-22). The distributor was required to sell only at the prices suggested in the Symbra'Ette ordering forms (CX 74P; Op. 21).

Petitioners also imposed upon their distributors certain restrictions which limited the persons to whom a distributor could resell his merchandise (Op. 23; I.D. 23-25). No sales were allowed by one distributor to the retail customer of another (CX 74N; I.D. 23). Similarly, a Key Distributor was confined to purchasing Symbra'Ette merchandise only from his sponsor (CX 74D; I.D. 24). Transfer to another sponsor could be made only upon approval by both the distributor's District Manager and Regional Manager as well as by the home office (CX 74Q). Finally, petitioners limited the customers to whom a distributor could sell his Symbra'Ette products (Op. 23). While direct home sales, home service routes, and certain exclusive boutiques handling custom fitting were authorized, sales to retail outlets and establishments handling competing merchandise were expressly forbidden (CX 74P; Op. 23; I.D. 24-25).

The facts disclosed in the record are further discussed infra, pp. 26-58, with regard to whether substantial evidence supports the Commission's findings.

ARGUMENT

Preliminary Statement

This Court has recognized that "the most literal truthfulness" in advertising is the rule of trade under the Federal Trade Commission Act. Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944); Moretrench Corporation v. FTC, 127 F.2d 792, 795 (2d Cir. 1942). Indeed the Court has expanded the doctrine to encompass advertising which "'as a whole may be completely misleading although every sentence separately considered is literally true,'" because "'things are omitted that should be said, or because advertisements are composed or purposefully printed in such a way as to mislead.'" FTC v. Sterling Drug, Inc., 317 F.2d 669, 675 (2d Cir. 1963). "[A]ctual deception of the public need not be shown in Federal Trade Commission proceedings" for "[r]epresentations merely having a 'capacity to deceive' are unlawful." Charles of the Ritz Distributors Corp. v. FTC, supra, at 680. See also FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934); FTC v. Sterling Drug, Inc., supra, at 674; Goodman v. FTC, 244 F.2d 584, 602, 604 (9th Cir. 1957).

Free and open competition is also the rule of trade under the Federal Trade Commission Act and in this respect Section 5 of the statute was intended to reach further than legislation such as the Sherman Act and the Clayton Act. FTC v. Cement Institute, 333 U.S. 683, 693 (1948); Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941); Grand Union Co. v.

v. FTC, 300 F.2d 92, 98-99 (2d Cir. 1962). The Commission is to consider and apply "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

It is familiar doctrine that vertical price fixing agreements are unlawful whether entered into voluntarily or as a result of coercion. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911); Albrecht v. Herald Co., 390 U.S. 145, 151 (1968); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722-723 (1944). The Supreme Court has further held that where a manufacturer sells products to his distributor subject to a restriction upon the customers to whom the distributor may resell the products, a per se violation of Section 1 of the Sherman Act results. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379, 382 (1967).

In this Court the issues presented by petitioners concern (1) whether substantial evidence supports the Commission's findings that petitioners engaged in deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act, and (2) whether the sanctions of the Commission's order are warranted by the proven violations and whether the Commission properly exercised its discretion in its choice of remedy (Pet. Br. 2-3).

The following well-established principles are pertinent in assessing these contentions. As this Court held in Callaghan & Co. v. FTC, 163 F.2d 359, 372 (2d Cir. 1947), a court on review of the Commission's findings or order is not to weigh the evidence to determine in which direction it preponderates. The Court stated the rule as follows (163 F.2d at 372):

> It is well settled that in reviewing an order of the Federal Trade Commission in respect to the sufficiency of the findings upon which it is based our power is limited to the determination of whether there is substantial evidence to support them. It is not enough for the petitioners to persuade us that there was evidence on which the facts as claimed by them might have been found, or inferences favorable to them might have been drawn, by the Commission. Sec. 5(c) of the Federal Trade Commission Act, 15 U.S.C. §45(c), makes all the findings of the Commission which are supported by the evidence conclusive upon us. The existence in the record of substantial evidence to support the findings is a matter which must appear to our staisfaction if the order is to be given effect but the weight to be be given established facts and what reasonable inferences may be drawn from them is within the sole province of the Commission.

The substantial-evidence rule is satisfied if there is of record "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' . . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106 [1942]; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 21 [5th

Cir. 1960]." Consolo v. FMC, 383 U.S. 607, 619-20 (1966). See also Standard Distributors, Inc. v. FTC, 211 F.2d 7, 12 (2d Cir. 1954); Fioret Sales Co., Inc. v. FTC, 100 F.2d 358, 359 (2d Cir. 1938).

I. Substantial evidence supports the Commission's findings that petitioners engaged in deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act

A. Substantial evidence supports the finding that the Symbra'Ette Marketing Plan had the substantial tendency, capacity, and potential to mislead

The deception inherent in petitioners' marketing plan is its promise of large financial rewards which were impossible to achieve. The program was composed of five distributional levels which could be ascended by the successful Symbra'Ette distributor: Key Distributor, Senior Key, Supervisor, District Manager and Regional Manager. While one could "buy in" at one of the three lower levels, the program represented that the top two levels could be reached by a distributor by his developing a sufficiently large organization and by his maintaining a required level of purchases per month expressed as his "Retail Purchase Volume" (CX 74F, 75S). All distributors except for the Key Distributors bought directly from petitioners (CX 92(5)). A distributor's gross profit was the difference between the price he paid for Symbra'Ette products and the price at which he sold

them, plus, in the case of all but Key Distributors, additional profits on the purchase volume of those distributors sponsored by him. The basic discount accorded to each distributional level was computed from the Retail Purchase Volume (75S).

Petitioners' marketing plan was structured as a five-step ladder with each position -- Key Distributor, Senior Key, Supervisor, District Manager, and Regional Manager -- having specific functional attributes (CX 1D-1E, 74D, 74G-74K, 92(5)-92(7)).

Key Distributor - A prospect could start association with Symbra'Ette at this level by purchasing an inventory of $300 at list price from a sponsor (CX 74D, 74G, 92(5)). This required an investment after discount of about $215 (CX 75Z13). Key Distributors were not permitted to purchase directly from Symbra'Ette but, were instead required to buy from their sponsors (CX 74D). A Key Distributor bought from his sponsor at 35 percent discount from the Symbra'Ette retail list price (CX 74D, 75S, 92(5)). Maintenance of a monthly purchase volume of $100 in terms of Symbra'Ette retail list prices was required (CX 74D).

Senior Key - A person could start as a Senior Key by purchasing an inventory of $1,000 of Symbra'Ette products from a sponsor at a 40 percent discount from the Symbra'Ette list price (CX 92(5)). With literature and sales aids an investment of about $700 was required (CX 75Z13). A person

could also become a Senior Key by advancing to that level from Key Distributor by sponsoring other Key Distributors and with such a "personal group" reaching a monthly retail purchase volume of $1,000 (CX 74G, 92(5)). Subsequent maintenance of a monthly purchase volume of $500 in terms of Symbra'Ette retail list prices was required of a Senior Key and his organization (CX 74D, 74G). Senior Keys could recruit additional distributors on an unlimited basis, and a Senior Key's organization or "personal group" included his directly sponsored Key Distributors' groups (CX 74G). A senior Key received a 40 percent profit on personal sales, a 5 percent profit on purchases made by his directly recruited Key Distributors, and a 1 percent profit on purchases made by directly recruited Senior Keys and their organizations (CX 92(5)).

<u>Supervisor</u> - A prospect desiring to start in the Symbra'Ette system as a Supervisor was required to purchase an initial inventory of $3,000 in terms of Symbra'Ette retail list prices at 45 percent off the retail list price (CX 75Z12, 92(5)). When literature, sales aids, and supplies were included the required investment was approximately $1,950 (CX 75Z12). Thereafter, Supervisors had to maintain a monthly retail purchase volume of $1,500 (CX 74D, 74H). A distributor who had at least one directly recruited Senior Key and two directly recruited Key Distributors could become a Supervisor if such distributors and their recruits as a group attained a monthly retail purchase

volume of $3,000 (CX 74G, 92(5)). A Supervisor could recruit an unlimited number of distributors (CX 74H). A Supervisor's organization or "personal group" consisted of his directly sponsored Senior Keys and their entire groups, and his directly sponsored Key Distributors and their entire groups (CX 74H, 92(5)). A Supervisor earned a 45 percent profit on personal sales, a 5 percent override on purchases made by his Senior Keys, a 10 percent profit on purchases made by his Keys, a 2 percent override on purchases made by his directly recruited Supervisors and their entire groups, and the right to qualify for a $100 cash car allowance if his organization's monthly retail purchase volume was $4,500 (CX 74H, 75Z2, 92(5)-92(6)).

<u>District Manager</u> - A District Manager purchased products from Symbra'Ette at a 50 percent discount from list price (74D, 75Z4, 92(6)). A District Manager could recruit an unlimited number of distributors (CX 74I). A District Manager's "personal group" included his directly sponsored Supervisors' entire group, his directly sponsored Senior Keys' entire group, and his directly sponsored Keys (CX 92(6)). To advance to the District Manager level a Supervisor had to have an organization reaching a retail purchase volume of $7,500 for one month, and to maintain thereafter a monthly purchase volume of $3,000 (CX 74H-74I, 92(6)). One could not begin as a District Manager but had to work one's way to this position by recruiting at least five people who either had entered at the Senior Key or Supervisor level or who had reached that level (CX 74H, 92(6)).

A District Manager earned a 50 percent profit on personal sales, a 15 percent profit on sales to his Keys, a 10 percent override on purchases of his Senior Keys, a 5 percent override on his Supervisors' purchases, a 3 percent override on the purchases of his directly sponsored District Managers' personal group, a 1 percent override on the purchases of his indirectly sponsored District Managers' personal group, and a cash car allowance of $150 if his personal group maintained a monthly retail purchase volume of $7,500 (CX 74I, 75Z4, 92(6)).

Regional Manager - The highest level one could reach under the Symbra'Ette program was that of Regional Manager (CX 74F, 74J, 92(6)). A Regional Manager bought his products at a 55 percent discount from Symbra'Ette (CX 74D, 75Z8, 92(6)). The personal group of a Regional Manager included his directly sponsored District Managers' entire group, his directly sponsored Supervisors' entire group, his directly sponsored Senior Keys' entire group, and his directly sponsored Key Distributors (CX 92(6)). A District Manager's personal group had to include at least three qualified direct District Managers and two qualified indirect District Managers, and his retail purchase volume had to reach $25,000 in one calendar month in order to entitle such District Manager to ascend to the position of Regional Manager (CX 74I, 75Z7, 92(7)). Thereafter, a monthly

minimum retail purchase volume of $12,500 was required to remain at this level of the program (CX 74D, 92(7)).

A Regional Manager earned a 55 percent profit on personal sales, a 20 percent profit on purchases of his Keys, a 15 percent override on his Senior Keys' purchases, a 10 percent override on his direct Supervisors' purchases, a 5 percent override on his directly sponsored District Managers' purchases, a 3 percent override on his directly sponsored Regional Managers' personal groups' purchases, and a $200 cash car allowance if a $17,500 monthly retail purchase volume was maintained by his personal group (CX 92(7)).

The following means were utilized by petitioners to illustrate their marketing plan: a direct mail brochure or pamphlet (CX 1); media advertising (CX 2); a motion picture film (CX 82); a newsletter called the Symbra'Ette News (CX 7-10); a Sales Manual (CX 74); and, a promotional aid known as a Flip Chart (CX 75).

The Flip Chart, employed by petitioners to entice prospective distributors into the Symbra'Ette organization, pictures in successive stages the expansion of a distributor's own personal group or organization (CX 75Q-75V, 75X-75Zil). It also focuses upon the apparent facility of a distributor's rising to the top level of Regional Manager (CX 75R):

> Top level under the company is the Regional Manager.
> (ANYONE CAN ACHIEVE THIS LEVEL)

It concludes its description of organizational growth with the following statement (CX 75Z11):

> You have seen how you may start as a Key Distributor and grow to be a . . . REGIONAL MANAGER.

Employed by petitioners to recruit distributors, the Flip Chart, as indicated by the testimony of former Symbra'Ette distributor, Mr. Dale Meredith, focused upon the importance of recruiting to the growth of a distributor's organization (Tr. 64):

> And this [Flip Chart] would show them how they could be at the top of this thing and how they could recruit people and their recruits recruit people and right on down the line.
>
> . . . .
>
> You could create a chain that would take in, probably, your recruits recruiting, their recruits recruiting more recruits, and more recruits, and more recruits.
>
> I went down this thing once, and I think I got to 44,000 people that I could have involved in this, if I could find that many people that would invest.
>
> . . . .
>
> Yes. We would go completely through it as how they could make it selling, how they could go into the party plan, and so forth. <u>But of course, I could just scan over this, because recruiting was the name of the game.</u> <u>We were out to recruit.</u> (Emphasis added.)

The brochure and the Sales Manual also feature organizational growth as the means to success (CX 1C-1H, 74B-74M). Each represents that climbing the ladder within the Symbra'Ette organization depended primarily upon the distributor's building his own organization through recruiting and sponsoring other

distributors who in turn would recruit and sponsor their own organizations in a constantly expanding chain (TR. 54-55). Recruiting is shown in the Sales Manual to be of particular importance for participants at the Supervisor and District Manager levels (CX 74H and 74L). Both the brochure and the Sales Manual also stress the ease of ascent inherent in the plan (CX 1E, 74D):

> YOUR LADDER TO SUCCESS
>
> The Symbra'Ette Marketing Program is designed so that the ambitious person can start small or as large as he desires. Consultants can rapidly work into higher income brackets . . . .

Like the Flip Chart, the Sales Manual proclaims (CX 74F):

> The top level of distribution, under the Company, is Regional Manager and anyone can achieve this level.

The Symbra'Ette News also features the importance of recruiting (CX 8C, 10C; RX12).

The marketing plan's inherent growth potential is also highlighted in petitioners' printed media advertising (CX 2B):

> The SYMBRA'ETTE Marketing Plan has success "built in" all the way.

Finally, sizeable material benefits were promised to the prospective distributor under the plan (CX 1C, 74B, and 82). The Sales Manual provides (CX 74B):

> YOUR PROGRESS, GROWTH, AND INCOME will be determined by only one person . . . YOU!!

> The Symbra'Ette sales program offers more than just security for you and your family, it offers, independence, a promising future, a retirement plan and an income substantial enough so that you can afford the luxuries, as well as the essentials of life . . .
>
> We know many who have achieved this goal within a year. Their success story can be yours too!!

The inherent deceptiveness of petitioners' marketing plan lies in its promise of an objective which is mathematically impossible to achieve. It is represented that five persons can be recruited by each participant in the program (CX 75U, 75Z). No limitation is placed, however, upon the number of persons to be recruited. This is because the program depends upon an ever widening base growing in geometric progression. And here lies the deception inherent in petitioners' marketing plan. If each participant recruited only five new recruits each month, and each of those new recruits in turn recruited five additional new recruits in the following month, and this process were allowed to continue, at the end of only twelve months there would be over 244,000,000 participants in the twelfth level alone.[8] Even if each distributor instead

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8 / The formula for calculating the number of participants in any level "n" is $n=x^i$, where "x" is the number of recruits per participant per level (i.e., 5 in this case) and "i" is the level (i.e. 12 in this case). Thus $n=5^{12}=244,140,625$. Of course the number of total participants would be higher since participants at lesser levels would still be part of the program. Cf., Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wash. 2d 630, 409 P.2d 160, 163 (1966).

recruited only two persons in the first month, and each of these in turn recruited two during the second month, and this process were to continue, there would still be approximately 8,200 participants in the twelfth level at the end of one year. This achievement is an impossibility. No such numbers could ever be reached under Symbra'Ette's marketing plan notwithstanding the fact that the Symbra'Ette program promises each prospective distributor an opportunity which only these numbers could fulfill. 9/ Instead, in a plan of this kind, founded upon rapid growth in geometric progression, the number of potential distributors will rapidly diminish. The inevitable result will be that the opportunity for success actually available to a later recruit will be substantially less than that afforded an earlier participant. The Commission so found (Op. 8):

> . . . at some point the representation that the plan affords a reasonable business opportunity will be made to individuals to whom it will appear plausible, but for whom it will be blatantly untrue, by virtue of the fact that the universe of potential recruits . . . has been effectively exhausted.

And yet every such later participant is still required to incur the same costs in terms of money, time, labor and energy as are exacted from the earlier recruits whose chances for success

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9/ The largest number of distributors actually attained by petitioners was 3,600 (Op. 9). Petitioners' expert witness, Dr. Wassenaar, conceded that 3,000 distributors was probably its saturation point (Tr. 273-76).

were far greater. Consequently, by unknowingly incurring the same costs for a lesser opportunity the later participant is deceived.

The Commission accordingly held petitioners open-ended marketing plan to be inherently deceptive in violation of Section 5 of the Federal Trade Commission Act (Op. 11).

The Supreme Court has left no doubt that business methods having only a capacity to deceive constitute a violation of Section 5 of the Federal Trade Commission ACt. FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934), and this Court has also applied the principal. Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944); FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963). See also Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967); Ford Motor Co. v. FTC, 120 F.2d 175, 181 (6th Cir. 1941).

"It is therefore necessary in these cases to consider the advertisement in its entirety and not engage in disputatious dissection. The entire mosaic should be viewed. . ." FTC v. Sterling Drug, Inc., supra, at 674. Accordingly, "[t]he important criterion is the net impression which the advertisement is likely to make upon the general populace." Charles of the Ritz Distributors Corp v. FTC, supra, at 679. Accord, Goodman

v. FTC, 244 F.2d 584, 601 (9th Cir. 1957), which expands the rule to require that "the pattern and frame-work of the whole enterprise must be taken into consideration." [Emphasis in original.]

The Supreme Court has also made it clear that while reviewing courts give final meaning to the term "deceptive practices," they are required to accord great weight to the Commission's judgement. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); FTC v. Mary Carter Paint Co., 382 U.S. 46, 48-49 (1965). Accord, Floersheim v. Weinburger, 346 F. Supp. 950, 958 (D.D.C. 1972). "Congress advisedly left the concept [of unfair methods of competition] flexible to be defined with particularity by the myriad of cases from the field of business." FTC v. Motion Picture Advertising Service Co., Inc., 344 U.S. 392, 394 (1953). The Supreme Court in the Colgate-Palmolive decision set forth the Commission's function (380 U.S. at 385):

> This statutory scheme necessarily gives the Commission an influential role in interpreting §5 and applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position then are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgement is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a §5 violation in this field rests so heavily on inference and pragmatic judgment. . . .

"The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission . . ." Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956), cert. denied, 352 U.S. 1025 (1957). Accordingly, in determining what trade practices are deceptive, the Commission may draw its own inferences from an advertisement. Carter Products, Inc. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963); Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (7th Cir. 1944).

Petitioners' plan was found by the Commission to have the tendency, capacity, and potential to mislead and thus to be inherently deceptive, because it held out a promise which for many would prove impossible. "[N]o scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise." Public Clearing House v. Coyne, 194 U.S. 497, 515 (1904). "The fundamental vice of inducing belief that benefits are absolute and general which in truth and fact are limited, uncertain, rare or non-existent, pervades the whole body of petitioners' advertising . . ." Irwin v. FTC, 143 F.2d 316, 324 (8th Cir. 1944). "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else." FTC v. Algoma Lumber Co.. 291 U.S. 67, 78 (1934). See also FTC v. Royal Milling Co., 288 U.S. 212, 217 (1933).

Petitioners' assertion in their brief (Pet. Br. 15) that the instant matter is not in the public interest is without merit. This Court has observed that in determining what action by the Commission will be in the public interest, "the Commission is better able to judge whether [a] proceeding is a step forward in the attainment of a higher morality in the great mass of information and propaganda designed to influence the public." Exposition Press, Inc. v. FTC, 295 F.2d 869, 873-4 (2d Cir. 1961). "[T]he Commission has broad discretion in determing whether a proceeding brought by it is in the public interest . . ." Guziak v. FTC, 361 F.2d 700, 704 (8th Cir. 1966), cert. denied, 385 U.S. 1007 (1967). See also FTC v. Rhodes Pharmacal Co., 191 F.2d 744, 747 (7th Cir. 1951); Ford Motor Co. v. FTC, 120 F.2d 175, 182 (6th Cir. 1941).

Similarly, the reliance by petitioners upon evidence in the record suggesting that certain Symbra'Ette distributors enjoyed profitable operations and were not deceived (Pet. Br. 16-17) is misplaced. "[A]ctual deception of the public need not be shown in Federal Trade Commission proceedings." Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944). Such testimony "is in fact not needed to support an inference of deceptiveness by the Commission." Exposition Press, Inc. v. FTC, supra, at 872. See also Independent Directory Corp. v. FTC, 188 F.2d 468, 471 (2d Cir. 1951); Herzfeld v. FTC, 140 F.2d 207, 208 (2d Cir. 1944);

FTC v. Balme, 32 F.2d 615, 621 (2d Cir. 1928), cert. denied, 277 U.S. 598. Nor can petitioners derive support from a Law Judge's dismissal of a Commission complaint in Certified Building Products, Inc., Docket No. 8875. The Administrative Law Judge was reversed by the Commission and a cease and desist order was issued in that case. 3 Trade Reg. Rep. ¶20,506 (1974), appeal docketed, No. 74-1112 (10th Cir. Mar. 13, 1974). Similarly, S. Buchsbaum & Co. v. FTC, 160 F.2d 121 (7th Cir. 1947), cited by petitioners (Pet. Br. 17-18), is readily distinguished from the present matter. In Buchsbaum the Court observed that the Commission had made no finding "that the deception, if any, had ever resulted in or had any tendency to result in detriment to the purchasing public." 160 F.2d at 123-124. The Commission in the instant proceeding, however, has found that the Symbra'Ette marketing program had the "substantial tendency" to mislead (Op. 8), was "offending" (Op. 8), was "inherently deceptive" (Op. 10), and was one which "threatens severe injury" to participants (Op. 11).10/

Petitioners' challenge of the Commission's finding that the Symbra'Ette marketing program had the substantial tendency, capacity, and potential to mislead (Pet. Br. 18-23) is unpersuasive. Petitioners' promotional materials both represent that each distributor will be able to recruit five additional participants (CX 75U, 75Z) and describe an open-ended marketing

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10/ In any event, Buchsbaum, insofar as it holds that the Commission must find actual injury to the public, is contrary to the great weight of authority, see supra, pp. 38-39, and appears to have been implicitly overruled by the Court of Appeals for the Seventh Circuit. See Spiegel, Inc. v. FTC, 494 F.2d 59, 62 (7th Cir. 1974), cert. denied, 419 U.S. 896; Montgomery Ward & Co. v. FTC, supra, 379 F.2d at 670, 671.

plan in which the supply of potential Symbra'Ette distributors is unlimited (CX 74L). In a program such as petitioners' which was based upon an endless chain of recruiting, the Commission reasonably concluded that "at some point" petitioners' representation of a reasonable business opportunity will prove "blatantly untrue" in the case of some individuals because "the universe of potential recruits . . . has been effectively exhausted" (Op. 8). For the Commission to draw such an inference was entirely proper. "[T]he Commission may draw its own inferences from the advertisement and need not depend on testimony or exhibits (aside from the advertisements themselves) introduced into the record." Carter Products, Inc. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963). Nor will such a finding be undermined, as petitioners suggest (Pet. Br. 18), by the absence in the record of actual deception or injury. "The Commission was not required to sample public opinion to determine what the [petitoners were] representing to the public. The Commission had a right to look at the advertisements in question, consider the relevant evidence and then decide for itself whether the practices engaged in by the [petitioners] were unfair or deceptive, as charged in the complaint." Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (7th Cir. 1944).

Petitioners' reliance in their brief (Pet. Br. 20) upon Arnold Stone Co. v. FTC, 49 F.2d 1017 (5th Cir. 1931), is misplaced. It appears there that respondents' products were

usually purchased by architects, contractors, and builders for whom the possibility of deception was remote. Petitioners' marketing plan, however, is sold to ordinary "men and women throughout the country" (Op. 3) to whom it was represented that "[r]egardless of who you are, where you are from, or what you are now doing, there is a place for you in the growing and profitable Symbra'Ette Organization . . ." (CX 1H). The important criterion is the net impression which the representation is likely to make upon the general populace, and not whether the wise or sophisticated may be deceived. Charles of the Ritz Distributors Corp. v. FTC, supra, 143 F.2d at 679-680.

Nor can petitioners derive support from J. B. Lippincott Co. v. FTC, 137 F.2d 490 (3d Cir. 1943), cited by petitioners (Pet. Br. 20) for the proposition that evidence to be substantial must afford a substantial basis from which the fact in issue must be reasonably inferred. Indeed there is ample evidence in the record to support the finding that petitioners' marketing plan, by holding out the promise of rapid advancement and large earnings, had "the substantial tendency, capacity, and potential to mislead" (CX 1A-H, 74B-74L, 75R-75V, 75X-75Z11; Op. 8). Furthermore, petitioners' reliance upon the doctrine therein stated that circumstantial evidence lending equal support to two inconsistent inferences is not substantial evidence sufficient to support a finding by an administrative body is contrary to the law as stated by the Supreme Court. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an

administrative agency's finding from being supported by substantial evidence. NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106 [1942]; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 21 [5th Cir. 1960]." Consolo v. FMC, 383 U.S. 607, 619-20 (1966). "[S]tatements susceptible of both a misleading and a truthful interpretation will be construed against the advertiser." Murray Space Shoe Corporation v. FTC, 304 F.2d 270, 272 (2d Cir. 1962). For the same reason, the reliance by petitioners in their brief (Pet. Br. 21, 23) upon Gelb v. FTC, 144 F.2d 580 (2d Cir. 1944), is also unwarranted. Nor is Korber Hats, Inc. v. FTC, 311 F.2d 358 (1st Cir. 1962), of assistance to petitioners (Pet. Br. 23, 25). That the Commission's findings in that case were supported by consumer testimony lends no support to petitioners' assertion that the Commission was required to rely on such testimony in the instant matter. Instead the appellate court in the Korber Hats decision, by reaffirming its inability to pick and choose for itself among uncertain and conflicting inferences, observed that it must affirm a Commission finding supported by substantial evidence. 311 F.2d at 362.

The assertion by petitoners' in their brief (Pet. Br. 23-24) that a finding of inherent deception or injury must be

supported by a finding of actual injury or damage is without substance. Evidence of actual injury or deception is not required to support a finding of inherent deception. See cases cited p. 39, supra. Furthermore, in drawing inferences from the evidence, the Commission has not committed an abuse of administrative procedure as petitioners suggest (Pet. Br. 24-25). It was the Commission's analysis of the Symbra'Ette marketing plan on the record as a whole which formed the basis for its finding inherent deception (Op. 3-12).

The contention that the Law Judge exhibited prejudgment or bias during a prehearing conference (Pet. Br. 26-30) in his reference to newspaper articles concerning multi-level sales programs is unpersuasive. There is nothing in the record which suggests that the Law Judge failed to rely exclusively upon documentary evidence and testimony in the present matter in reaching his conclusions. Furthermore, the assertion of procedural irregularity on the part of the Law Judge was never made to the Commission during the administrative proceeding. Not having raised this issue before the Commission, petitioners may not now raise it before this Court. Moog Industries, Inc. v. FTC, 355 U.S. 411, 414 (1958), rehearing denied, 356 U.S. 905; United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 36-37 (1952).

Finally, the reliance by petitioners (Pet. Br. 30-31) upon Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971), to support the assertion that the Commission has unfairly singled out petitioners is without foundation and constitutes no defense to the Commission's proceeding against them. It is sufficient that substantial evidence support the Commission's finding that petitioners' marketing plan violates Section 5 of the Federal Trade Commission Act and that such a finding is in accordance with the law. Supra, pp. 26-38.[11/]

Further, policy judgments concerning the allocation of its resources and the effect thereof upon competition are matters within the administrative discretion of the Commission. Moog Industries, Inc. v. FTC, supra, at 413. See discussion pp. 63-65, infra. Indeed, this Court in the Marco decision, while requiring that the Commission explain inconsistent treatment of competitors, expressly acknowledged that "it is no defense . . . that the cease and desist order is directed to [them] alone." 453 F.2d at 6. The instant proceeding therefore represents no departure from the Court's holding in the Marco decision. In any event, the Commission references (Op. 25) administrative proceedings undertaken against four other firms utilizing multi-level open-ended pyramid-type marketing plans similar to that of petitioners.

11/ "The purpose of Commission orders is not to put those employing deceptive acts or practices in pari delicto with each other." P. F. Collier & Son Corp. v. FTC, 427 F.2d 261, 275 (6th Cir. 1970), cert. denied, 400 U.S. 926; accord, Spiegel, Inc. v. FTC, 494 F.2d 59, 64 (7th Cir. 1974), cert. denied, 419 U.S. 896.

B. Substantial evidence supports the Commission's findings that petitioners made the following representations:

(a) That it is not difficult for participants to ascend to a higher level within the marketing chain and thereby increase their chances of recouping their investments and of earning the represented profits

The record discloses that throughout their promotional literature petitioners stressed the ease with which a prospective distributor might rise to the top of the Symbra'Ette ladder (CX 1B, 1E, 2B, 74B, 74D, 74F, 74J, 75R, 75Y, and 75Z11).

Ease of ascent to higher levels within the Symbra'Ette organization is best expressed in the Flip Chart (CX 75R):

> Top level under the company is the Regional Manager. (ANYONE CAN ACHIEVE THIS LEVEL.)

The Flip Chart concludes its discussion of petitioners' marketing plan by focusing upon the question of ascent through the Symbra'Ette structure (CX 75Z11):

> You have seen how you may start as a Key Distributor and grow to be a . . . REGIONAL MANAGER.

The brochure used in petitioners' direct mail advertising also portrays the Symbra'Ette organization as a ladder readily ascended (CX 1E):

> YOUR LADDER TO SUCCESS
>
> The Symbra'Ette Marketing Program is designed so that the ambitious person can start small or as large as he desires. <u>Consultants can rapidly work into higher</u>

> income brackets, or those who would like to enter business on a large scale may buy in as a Supervisor. [Emphasis added.]

The Sales Manual also promises rapid advancement to the Symbra'Ette distributor (CX 74B, 74D, and 74F). Both the objective and the time required to reach it are described (CX 74B):

> The Symbra'Ette sales program offers more than just security for you and your family. It offers, independence, a promising future, a retirement plan and an income substantial enough so that you can afford the luxuries, as well as the essentials of life . . . . .
>
> We know of many who have achieved this goal within a year. Their success story can be yours too!!

The Sales Manual was used in the recruiting process to demonstrate ease of ascendency in the Symbra'Ette organization (TR. 64).

Petitioners media advertising also highlights growth and rapid progress (CX 2B):

> Once you establish your Symbra'Ette distributorship, it almost grows by itself . . . The potential is astronomical . . . you can still get in on the ground floor!

(b) That all participants in the marketing program have the potentiality and reasonable expectancy of receiving large profits or earnings

Large financial rewards were promised to the Symbra'Ette distributor in petitioners' promotional literature (Tr. 47, 53-54; CX 1E, 2A, 74B, 74D, 74J, 75V, 75Y, 75Z, 75Z2-75Z6,

75Z8-75Z10). The direct mail brochure stresses the availability of sizeable monetary compensation (CX 1C):

> The Symbra'Ette program offers to sincere, ambitious people from all walks of life and business or professional backgrounds an opportunity to supplement their present incomes on a part time basis or to earn middle to upper five figure annual incomes, working full time.

The various levels of possible earnings are carefully set forth in the brochure (CX 1E-1H), the Sales Manual (CX 74D, 74E, 74G-74K), and the Flip CHart (75S, 75V, 75Y-75Z6, 75Z8-75Z10).

The attainment of large earnings is also highlighted in petitoners' recruiting efforts. Former Symbra'Ette distriLutor, Mr. Meredith, testified that the distributor by whom he was recruited made just such a promise (TR. 47): "And then . . . he talked about the possible earnings of sixty or seventy thousand dollars a year."

(c) That the marketing program is commercially feasible for all participants and that the supply of available entrants and investors is virtually inexhaustible.

Petitioners promotional literature focuses upon the open-ended feature of the Symbra'Ette marketing plan. The prospective Symbra'Ette distributor is advised that organizational growth is inherent in the plan (CX 2B), that anyone can rise to the top of the organization (CX 74F, 75R), and that the universe of prospective recruits is unlimited (CX 74L).

Petitoners describe in their Sales Manual an open-ended marketing plan in which there is neither numerical limitation to the number of available recruits nor geographical limitation upon recruiting by distributors at any functional level (CX 74D-74L).

Commercial feasibility is also stressed by petitioners in their literature. The brochure represents the plan as "a most unique combination of salable merchandise and a proven field tested marketing program" (CX 1C). While both the Sales Manual and the brochure picture the organization as a ladder which is readily ascended (CX 1D, 1E, 74D), it is further represented in the Flip Chart that a distributor's performance at each level leads as a matter of course to the next higher level (CX 75T-75V, 75X-75Z11). The description of upward mobility concludes with the following statement highlighting the feasibility of the program (CX 75Z11):

> You have seen how you may start as a Key Distributor & grow to be a . . . REGIONAL MANAGER.

Petitioners' promotional literature focuses upon the importance of recruiting and thereby assumes an inexhaustible supply of potential recruits (CX 74L). In the recruiting process, the importance of the recruiting function is brought home to the prospective Symbra'Ette distributor (Tr. 54-55, 60, 64, 78, 91, 99). Former Symbra'Ette distributor, Mr. Meredith,

testified concerning the emphasis placed upon the recruiting function by petitioners in their advertising (TR. 78): "Every piece of literature they put out indicated recruiting as the name of the game." Mr. Meredith also characterized his initial purchase from petitioners as comprehending a right to recruit (Tr. 99):

> Q. When you paid $742, at the time you signed the contract, what did you understand you had purchased for that $742?
>
> A. My personal understanding was that I had purchased the privilege of recruiting people and being paid over-ride on these people. I realized that there was some inventory and supplies involved and, of course, you needed this inventory and supplies to show to people to recruit people.

The testimony and documentary evidence compel the conclusion that petitioners through their promotion materials made each of the three specific representations discussed above. In Goodman v. FTC, 244 F.2d 584, 599 (9th Cir. 1957), the court upheld a Commission finding that representations of large future earnings were unlawful, while stating that "[t]hese misrepresentaions were of the type which courts have condemned repeatedly." And the Commission may require that representations of potential benefits have a basis in fact. Tractor Training Service v. FTC, 227 F.2d 420, 425 (9th Cir. 1955), cert. denied, 350 U.S. 1005.

The record therefore amply supports the Commission's findings that the challenged representations were made in petitioners' promotional literature and that these specific representations were deceptive (Op. 13).

No objection to these findings is made by petitioners in their brief.

C. Substantial evidence supports the finding that petitioners have entered into contracts, agreements, combinations and understandings with their distributors whereby all such distributors (a) agree to maintain the resale prices established by petitioners, and (b) agree upon the fees, bonuses, discounts, rebates, and overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors

Petitioners have stipulated to entering into contracts with their distributors to effectuate their plan of distribution (CX 92(2)). Each distributor's sale of Symbra'Ette products is governed by specific restrictions as set forth in the Sales Manual (CX 74N-74R). The distributor agreement provides, in pertinent part, as follows (CX 11-22):

> As a condition of this agreement, I agree to purchase and sell Symbra'Ette products according to the procedure set forth in the Sales Manual and referred to in the Rules and Regulations. Said Rules and Regulations are an integral part of this agreement and by this reference are incorporated herein, and I agree to abide by any and all of the terms and conditions set forth therein, and any amendments thereto.

Once such condition is that each distributor sell only at those prices suggested by petitioners. The Sales Manual, in pertinent part, so provides (CX 74P): ". . . you buy Symbra'Ette products at wholesale prices -- to be sold through personal sales direct to the public at suggested retail prices." Suggested retail prices were set forth in forms utilized by petitoners' distributors to order Symbra'Ette products (CX 24-46, 78-79; I.D. 23).

Those not adhering to petitioners' pricing restrictions were subject to termination. The distributor agreement, in relevant part, so provides (CX 11-22):

> Violation of any of the aforementioned ethical standards and itemized rules or sound business practices shall be considered just cause for the termination of all contractual arrangements between Ger-Ro-Mar Inc. and the violator.

Accordingly, petitioner effectively fixed the prices at which their distributors could resell Symbra'Ette products.

They also agreed with their distributors upon the fees, bonuses, discounts, rebates, and overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors. The schedule of these items of remuneration which petitioners had put into effect (Tr. 179-186; CX 92(4)-92(7)) is set forth in the brochure (CX 1D-1G), the Sales Manual (CX 74D, 74E, 74G-74K), and the Flip Chart (CX 75Y, 75Z, 75Z2-75Z6, 75Z8-75Z10). The Symbra'Ette system of overrides, based upon the purchase by recruits of products at prescribed amounts, constituted an indirect means of setting the wholesale prices at which the products were to be sold to distributors on different functional levels.

The Supreme Court decisions leave no doubt that vertical price fixing is illegal per se under Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. FTC v. Beech-Nut Packing Co., 257 U.S. 441, 452-53 (1922); United

States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956); United States v. Parke, Davis & Co., 362 U.S. 29, 42 (1960); Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5 (1958). "[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act . . ." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940). Price fixing is also illegal per se under Section 5 of the Federal Trade Commission Act. National Macaroni Manufacturers Association v. FTC, 345 F.2d 421, 427 (7th Cir. 1965); Sun Oil Co. v. FTC, 350 F.2d 624, 631 (7th Cir. 1965), cert. denied, 382 U.S. 982 (1966). "We start, of course, from the premise that so far as the Sherman Act and the Federal Trade Commission Act are concerned, a price-fixing combination is illegal per se." Sun Oil Co. v. FTC, supra, at 631. "Prices are fixed when they are agreed upon." United States v. Masonite Corp., 316 U.S. 265, 276 (1942). Accord, Sun Oil Co. v. FTC, supra, at 634.

It was in binding their distributors by contract to sell Symbra'Ette products at suggested prices that petitioners violated the law.[12/] "It is the agreement to fix prices in

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12/ The illegality of a price agreement does not rest upon whether the parties achieved the objective of the agreement. United States v. Socony-Vacuum Oil Co., supra, 310 U.S. at 219-220. It is "clear law that price fixing as an unlawful act includes any tampering with or manipulation of prices . . . . [I]t is not important that the prices fixed were not fixed in the sense that they were uniform and inflexible." Allied Paper Mills v. FTC, 168 F.2d 600, 607 (7th Cir. 1948), cert. denied, 336 U.S. 918 (1949). The "degree of success in stifling price competition is not the measure of . . . liability." Id., at 608.

concert that renders the conspiracy illegal." Fort Howard Paper Co. v. FTC, 156 F.2d 899, 905 (7th Cir. 1946), cert. denied, 329 U.S. 795. It is unimportant whether the prices fixed are reasonable or unreasonable "since it [the agreement] is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreements is to raise or to decrease prices." United States v. McKesson & Robbins, Inc., supra, at 310.

The central objective underlying the law against price fixing is the preservation of competition in the market place. Once a manufacturer has "sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 409 (1911). In United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927), the Supreme Court articulated the policy as follows:

> [I]t cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. . . .
>
> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price

> fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.

Petitioners were therefore found by the Commission to have agreed to fix prices. The Commission held the agreement illegal per se (Op. 21).

Again no objection to this finding is made by petitioners in their brief.

D. Substantial evidence supports the finding that petitioners contracted with their distributors to restrict the customers to whom distributors might resell their products; to restrict the sources of supply from which distributors might purchase their products; and to restrict distributors to selling through specified retail channels

The evidence supports the Commission's finding (Final Or. 1) that petitioners entered into contracts, agreements, combinations, and understandings with their Symbra'Ette distributors (CX 11-22, 74N) whereby all distributors upon becoming participants in the Symbra'Ette program agree not to compete for each others' customers. The Sales Manual, whose regulations all distributors have agreed to follow, provides, in relevant part, as follows (CX 74N):

> A retail customer belongs to the Consultant who obtains the order. A consultant retains his customers as long as he continues to service them properly.

Similarly the evidence also supports the Commission's finding (Op. 23) that petitioners entered into contracts,

agreements, combinations, and understandings with their Symbra'Ette distributors (CX 11-22, 74N) which, by requiring all Key Distributors to purchase merchandise only from their sponsors, prevented, restricted, and prohibited Key Distributors from purchasing from Symbra'Ette distributors other than their sponsors (CX 1E, 74D, 75R). The restriction is illustrated by an announcement appearing in the Symbra'Ette News (RX 12):

> We are receiving orders from Key Consultants who seem to have the impression that they may order direct from the Company. The ordering policy is that Keys must order through their sponsors.
>
> Please ensure that all new recruits be instructed accordingly.

The policy was enforced. A distributor wishing to transfer to another sponsor was required to secure approval of the move. The Sales Manual so provides (CX 74Q):

> If a Consultant prefers to be transferred to another Sponsor for more convenience, he must have the approval of his Sponsor and his District Manager and Regional Manager, and a letter to that effect must be presented to the Home Office for approval.

The record also supports the Commission's finding (Op. 23) that petitioners entered into contracts, agreements, combinations and understandings with their distributors which required all distributors to restrict the retail sales and display of Symbra'Ette products to authorized retail channels including only those where custom fitting was done and where no competing products were sold. Once again the policy is spelled out in the Sales Manual

(CX 74P):

> Symbra'Ette products are not to be sold in retail stores.
>
> Only exclusive boutiques or similar establishments where custom fitting is done, and no competitive line is sold can be considered as acceptable.

Such arbitrary restrictions by a manufacturer, who has already parted with title to the product, which limit the persons with whom a distributor may deal, constitute a direct conflict with the holding in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378 (1967). The Supreme Court stated the rule 13/ as follows (388 U.S. at 379, 382):

> . . . where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a per se violation of the Sherman Act results . . . the same principle applies to restrictions of outlets with which the distributors may deal.
>
> . . . .
>
> Once the manufacturer has parted with title and risk he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred--whether by explicit agreement or by silent combination or understanding with his vendee--is a per se violation of §1 of the Sherman Act.

See also Adolph Coors Company v. FTC, 497 F.2d 1178, 1188 (10th Cir. 1974), cert. denied, 419 U.S. ____ (Jan. 13, 1975).

13/ Exceptions to the Schwinn rule prohibiting restrictions upon resale have been recognized only under the most limited circumstances. See Tripoli Co. v. Wella Corp., 425 F.2d 932, 938 (3d Cir. 1970), cert. denied, 400 U.S. 831, where it was held that a customer restriction imposed to guard against physical injury was reasonable.

The Commission further adopted the Law Judge's conclusion (Final Or. 1) that the restrictions upon the disposition of Symbra'Ette products after their purchase by the distributors "were part of [petitioners'] resale price maintenance agreements, and as such must be considered as part of a total package of unlawful restraints" (I.D. 43). Anticompetitive practices found to be part of a price fixing scheme have been condemned as unlawful per se. United States v. Sealy, Inc., 388 U.S. 350, 356-358 (1967); United States v. Arnold, Schwinn & Co., supra at 373.

Here also, no challenge to the Commission's findings is advanced by petitioners in their brief.

II. The sanctions imposed by the Commission's order are warranted by the proven violations and the Commission properly exercised its discretion in its choice of remedy

The sanctions imposed by the Commission's order are authorized by the Act. The order is carefully drawn and provides that petitioners shall cease and desist from continuing the deceptive marketing plan and illegal business practices in which they have engaged (Op. 14-17, 22-26; Final Or. 2-5).

There is no merit in the contention (Pet. Br. 38-41) that the order is unreasonable and not supported by substantial evidence. All of the provisions of the order in the instant case are reasonably related to the violations by petitioners. The record shows that petitioners engaged in the following practices:

They devised and put into effect a pyramid-type merchandising program which was inherently deceptive (CX 1B-1H, 74B-74M, 75Q-75V, 75X-75Z13, 92(5)-92(7)).

They misrepresented in their promotional literature that it is not difficult for participants to ascend to higher levels within the marketing chain and thereby increase their chances of recouping their investments and of earning the represented profits (CX 1B, 1E, 2B, 74B, 74D, 74F, 74J, 75R, 75Y and 75Z11).

They misrepresented in their promotional literature that all participants in the marketing program have the potentiality and reasonable expectancy of receiving large profits or earnings (CX 1E, 2A, 74B, 74D, 74J, 75V, 75Z, 75Z2-75Z6, 75Z8-75Z10).

They misrepresented in their promotional literature that the Symbra'Ette marketing program is commercially feasible for all participants and that the supply of available entrants and investors is virtually inexhaustible (CX 1C-1E, 2B, 74D, 74F, 74L, 75R, 75T-75V, 75X-75Z11).

They pursued a resale price maintenance program with their distributors (CX 11-22, 24-46, 74N-74R, 78-79, 92(2)).

They agreed with their distributors upon the fees, bonuses, discounts, rebates, and overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors (CX 74D, 74E, 74G-74K, 92(4)-92(7)).

They restricted the customers to whom distributors might resell their products (CX 74N).

They resetricted the sources of supply from which distributors might purchase their products (CX 74D, 74Q, 75R).

They restricted their distributors to selling only through specified retail channels (CX 74P).

It is appropriate for the Commission to insure that with respect to petitioners' dealings with their distributors and retailers, there exist some safeguards for the future. Commission orders should be broad enough to prevent illegal practices in the future. Niresk Industries, Inc. v. FTC, 278 F.2d 337, 343 (7th Cir. 1960), cert. denied, 364 U.S. 883. Accord, Clinton Watch Co., v. FTC, 291 F.2d 838, 841 (7th Cir. 1961), cert. denied, 368 U.S. 952 (1962). "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices. . . ." Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946). It "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). "[T]hose caught violating the Act must expect some fencing in." FTC v. National Lead Co., 352 U.S. 419, 431 (1957). The Commission's determination of the required scope of an order is not to be disturbed unless the order has no reasonable relation to the unlawful practices found. Jacob Siegel Co. v. FTC, supra, at 613; FTC v. Mandel Brothers, Inc.

359 U.S. 385, 392-393 (1959); Exposition Press, Inc. v. FTC, supra, 295 F.2d at 874. "[I]t is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." United States v. du Pont & Co., 366 U.S. 316, 334 (1961).

Petitioners misconstrue the purpose of Paragraph 1 of the Commission's order (Final Or. 2) by arguing that it is unsupported by evidence of "inventory loading" by Symbra'Ette (Pet. Br. 38). The purpose of Paragraph 1 is to eliminate compensation to distributors for the act of recruiting unrelated to product sales to consumers (Op. 16). A distributor's profits will be founded upon his actual volume of retail sales and (if petitioners so choose) those of his recruits, rather than upon "the inventory purchases of recruits" (Op. 16).

Equally unpersuasive is petitioners' challenge to order Paragraph 2 (Pet. Br. 38-41). It is asserted that the presence of unlimited recruitment is not borne out of the record. To the contrary, abundant evidence in the record discloses a marketing plan whose appeal to the public is grounded in a chain of unlimited recruiting (Tr. 54-44, 60, 64, 78, 99; CX 8A-8C, 9F, 10B, 10C, 74L; RX 12).

Petitioners' reliance (Pet. Br. 40) upon Swanee Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961), cert. denied, 368 U.S. 987 (1962), is misplaced. The Court found nothing in the record to indicate flagrant or extensive violations by Swanee Paper Corporation of Section 2(d) of the Clayton Act. 291 F.2d at 837.

The Court also noted that the order simply reiterated the provisions of Section 2(d) of the Clayton Act. In the present matter, however, the record discloses an open-ended multi-level marketing scheme which the Commission found to be inherently deceptive (Op. 11), and concerning which specific misrepresentations were made in petitioners' promotional literature (Op. 12-13). Further, the order is carefully tailored to the precise violations found by the Commission. Nor is the Supreme Court's holding in FTC v. Royal Milling Co., 288 U.S. 212 (1933), of assistance to petitioners. Holding trade names containing the word "milling" to be valuable assets of firms selling flour, the Supreme Court permitted the company to continue use of such trade names if accompanied by qualifying language rather than entirely prohibit their use. Paragraphs 1 and 2 of the Commission's order in the present matter, however, are not unduly broad and go only so far as is necessary to eliminate the open-ended recruiting element from petitioners' marketing program. There is no merit to the suggestion (Pet. Br. 40-41) that Paragraph 2 of the order discriminates against third tier participants. As the Commission observed, Paragraph 2, while providing petitioners with the flexibility necessary to build a distribution organization in which profits are based upon retailing, will also "create a substantial interruption in the chain of recruitment" (Op. 17).

Finally, by focusing upon the third-tier participant, petitioners misstate (Pet. Br. 41) the purpose of the present Commission proceeding. A more accurate characterization of the Commission's objective is found in the following statement

of the rationale underlying the inclusion of Paragraph 2 (Op. 17):

> We believe that paragraph 2 will prevent abuses of the recruitment lure, and achieve the requisite "fencing in," while leaving [petitioners] appropriate latitude to develop a participant generated vertical distribution network in a nondeceptive manner.

In support of the argument that the Commission has unfairly focused upon their concern, petitioners claim (Pet. Br. 31) that the Commission's order will accord an unfair advantage to their competitors utilizing comparable marketing plans. The argument lacks substance. One found violating Section 5 cannot "become the vicarious champion in [his] own interest of imperfections in the discharge of the [Commission's] duties." Dairymen's League Cooperative Ass'n, Inc. v. Brannan, 173 F.2d 57, 66 (2d Cir. 1949), *cert. denied*, 338 U.S. 825. The statutory standards for the conduct of business must be maintained. The misconduct of others cannot excuse violations which would "drag the standards down." FTC v. Algoma Lumber Co., 291 U.S. 67, 79 (1934). *See also supra*, p. 45.

The reliance by petitioners in their brief upon the testimony of Dr. Wassenaar (Pet. Br. 32), however, is inapplicable here. Dr. Wassenaar's remarks are directed to a hypothetical situation where the multi-level feature of the Symbra'Ette plan is not present. Paragraph 2 of the Commission's order, however, leaves the multi-level facet of petitioners' program intact to the extent of three tiers (Final Or. 2).

Petitioners' effort to distinguish Commission proceedings against other firms utilizing open-ended multi-level pyramid

programs similar to petitioners' marketing plan (Op. 25) in order to show arbitrary Commission action (Pet. Br. 33) is without merit. While those firms may differ in their product lines, the central element common to petitioners and these other firms is the use of a pyramid-type open-ended marketing scheme which constitutes a violation of Section 5 of the Federal Trade Commission Act.

Petitioners' reliance in their brief (Pet. Br. 35-37) upon FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967), to support the claim of arbitrary Commission action is also unpersuasive. It is sufficient that the Commission found petitioners' marketing plan to be inherently deceptive in violation of Section 5 of the Federal Trade Commission Act, and that such finding is in accordance with the law. Supra, pp. 26-38. Furthermore, in overturning a circuit court's stay of enforcement which had been granted on precisely the grounds advanced by petitioners in the present matter, the Supreme Court determined that a Commission decision to proceed against one of the smaller competitors in the plumbing fixture industry should be upheld in accordance with the Court's earlier decision in Moog Industries, Inc. v. FTC, 355 U.S. 411, 413-414 (1958), rehearing denied, 356 U.S. 905, which relegates judgments concerning competitive effects and other questions bearing upon the allocation of Commission resources to Commission expertise. 387 U.S. at 249-250. The Commission's resources are severely limited. To impose upon it the requirement of bringing suits

against competitors would render the fulfillment of its statutory mission impossible.

Audivox, Inc. v. FTC, 275 F.2d 685 (1st Cir. 1960), and Sirbo Holdings, Inc. v. CIR, 476 F.2d 981 (2d Cir. 1973), relied upon by petitioners (Pet. Br. 35, 37) in support of their claim of arbitrary Commission conduct, are readily distinguished from the present matter. The former decision, unlike the instant matter, concerned the modification of one Commission order to correspond to the provisions of another order against a respondent's competitor. Petitioners, however, have indicated no comparable inconsistency between their treatment by the Commission and that accorded to other firms offering multi-level, open-ended, pyramid-type business opportunities proceeded against by the Commission. The Audivox decision therefore lends no support to petitioners' assertion, and does not stand for the proposition, that the issuance of a Commission complaint against a firm must be conditioned upon the initiation of companion proceedings against its competitors. The Sirbo Holdings case involved an effort on the part of the Court to resolve an inconsistency of approach in the treatment for tax purposes of a cash payment in satisfaction of a tenant's obligation to restore leased premises in two cases having substantially similar facts. Here again, however, no inconsistency of approach is evident in the Commission's decision in the present matter.

Direct Selling Associatin (DSA), a national trade association, has filed a Brief Amicus Curiae expressing its concern that the cease and desist order could have an adverse effect upon the recruiting practices of other firms (Am. Br. 2, 15). The order against Symbra'Ette, however, applies by its terms only to petitioners' and not to other direct sellers. Because no facts are presented in its brief suggesting an analogy to the present matter, DSA is limited to advancing only general allegations of uncertainty as to the possible application of the Commission's order to other pyramid-type schemes. The allegations are premature. Any possible application of the order in the future is only conjectural at this time. Courts deal with cases on the basis of facts disclosed in the record and "hypothetical controversies" need not be considered. Electric Bond Co. v. SEC, 303 U.S. 419, 443 (1938). The Commission and the courts consider "actual situations . . . [presented] in evidentiary form rather than as fantasies." FTC v. National Lead Co., 352 U.S. 419, 431 (1957).

If DSA is sincerely concerned with the application of the order, it may apply to the Commission for its views and advice. See Commission Procedures and Rules of Practice, Rule 1.1 (16 C.F.R. 1.1); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394 (1965); FTC v. National Lead Co., supra, at 431.

The Commission's decision (in contrast to the cease and desist order) may indeed have some influence on other sellers pursuant to the doctrine of stare decisis. Under legislation recently enacted into law, for example, the Commission's decision

could conceivably provide a basis for a civil action seeking penalties against other sellers. 88 Stat. 2183, 2201 (1975), P.L. 93-637.[14/]

In particular, DSA argues that the three-tier prohibition found in the Ger-Ro-Mar order should not be allowed to stand for the proposition that three tiers are the maximum allowable

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14/ Section 205 of the new statute, 88 Stat. 2201, provides, in relevant part, that:

> (B) If the Commission determines in a proceeding under subsection(b) [of Section 5 of the Federal Trade Commission Act] that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice--
>
> (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
>
> (2) with actual knowlege that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.
>
> In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.
>
> (C) In the case of a violation through continuing failure to comply with a rule or with section 5(a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of sub-paragraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.
>
> (2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. [Emphasis supplied.]

by law. The Commission's decision, of course, is not bottomed on that theory. Rather, it is grounded in a finding, fully supported by the evidence, that petitioners' multi-level, open-ended pyramid selling scheme (which involved an unlimited number of tiers) is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.

DSA apparently seeks to have this Court put some gloss on the Commission's decision which will limit its precedential value in other cases. The applicability of this case to other pyramid-type sales schemes, however, is a question which should be decided when the Commission relies upon this case as precedent in some other case, and not on the basis of abstract agruments presented now. Even if the Commission's opinion were construed as setting principles which the Commission intends to follow in other cases, it has the broad discretion to do so in this fashion rather than proceeding, as DSA suggests, by rulemaking. SEC v. Chenery Corp., 332 U.S. 194, 202-203 (1947); NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Commission's order to cease and desist should be affirmed and enforced in its entirety.15/

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February 1975

15/ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Section 5(c), 52 Stat. 113 (1938), 15 U.S.C. 45(c) (1970).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GER-RO-MAR, INC., et al., Petitioners,	)	
v.	)	No. 74-2343
FEDERAL TRADE COMMISSION, Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that service of respondent's, the Federal Trade Commission's, brief in this case has been made upon petitioners by mailing on this 26th day of February, 1975, copies thereof, postage prepaid, to their counsel, as follows:

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